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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 237

STATE OF ILLINOIS,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY, ET AL.,

Respondents-Plaintiffs,

AND

ALLIS-CHALMERS MANUFACTURING COMPANY, ET AL.,

Respondents-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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June 24, 1963.

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INDEX.

	PAGE
Petition for Writ of Certiorari	
Opinions Below	2
Jurisdiction	2
Questions Presented	2-3
Statutes Involved	3
Statement	4-5
Reasons for Granting the Writ	5-10
Appendix A	
Memorandum on Motion of the State of Illinois to Intervene as Party Plaintiff	11-19
Appendix B	
Opinion of the U. S. Court of Appeals	20-25

Cases Cited.

Board of Public Utility Commissioners v. New York Tel. Co., 271 U. S. 23, 32 (1926)	9
Clark Oil Co. v. Phillips Petroleum Co., 148 F. 2d 580 (C. A. 8th, 1945)	9
Clark v. Sandusky, 205 F. 2d 915, 919 (C. A. 7th, 1953)	10
Ford Motor Co. v. Bizanz Bros., Inc., 249 F. 2d 22, 28 (C. A. 8th, 1957)	10
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 281 F. 2d 481 (C. A. 3rd, 1960)	9
Keogh v. Chicago & N. W. Ry. Co., 260 U. S. 156 (1922)	5, 6
Kozak v. Wells, 278 F. 2d 104, 110 (C. A. 8th, 1960)	10
Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U. S. 500 (1936)	6

United States v. Philadelphia National Bank, 31 U.S. Law Week 4650 (June 17, 1963) 8
United States v. R. C. A., 358 U. S. 334, 337 (1959) 6, 8
Wolfe v. National Lead Co., 225 F. 2d 427 (C. A. 9th 1955) 9

MISCELLANEOUS.

Ill. Rev. Stats. (1961) Ch. 111⅔ § 76 9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner, State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cause on the 1st day of April, 1963.

OPINIONS BELOW.

The opinion of the District Court is reported at 207 F. Supp. 252, and reproduced herein as Appendix A, at p. 11, *infra*. The opinion of the Court of Appeals is reported at 315 F. 2d 564, and reproduced herein as Appendix B, at p. 20, *infra*.

JURISDICTION.

The judgment of the United States District Court for the Northern District of Illinois denying petitioner's intervention was entered on June 18, 1962. The judgment of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court was entered on April 1, 1963. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Was it error to hold that, as a matter of law, consumers of public utilities services whose rates have been increased because the utilities were overcharged for electrical equipment, in violation of the antitrust laws, have no claims against the suppliers of electrical equipment because of the increased charges they paid?
2. Were the consumers of public utilities and the State of Illinois properly denied intervention in a suit by the utilities against suppliers of electrical equipment under the antitrust laws? The effect of such exclusion of the consumers must be either (a) exoneration of the viola-

tors of the antitrust laws on the ground that the utilities passed on the loss to the consumers or (b) a windfall to the utilities who have passed on the illegal costs to the consumers?

STATUTES INVOLVED.

Section 4 of the Clayton Act, 15 U. S. C. §15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Rule 24 of the Federal Rules of Civil Procedure:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. . . ."

STATEMENT.

On July 31 and October 6, 1961, complaints were filed in the United States District Court for the Northern District of Illinois by several public utilities against the defendant electrical equipment manufacturers alleging violations of the federal antitrust laws by combinations and conspiracies to fix prices, allocate markets, and submit collusive bids. The effect of these price-fixing conspiracies, it was alleged, was the creation of "high and artificial levels" of prices for electrical equipment purchased by the plaintiff public utilities. (R. 13.)

There were eighteen such complaints filed involving two groups of public utilities and relating to nine different lines of electrical equipment. All of these cases—and many similar cases filed throughout the country—arose out of the United States' antitrust actions generally known as the Philadelphia Electrical Conspiracy Cases.

Among the plaintiffs are four public utilities operating in the State of Illinois: Commonwealth Edison Company, Central Illinois Electric & Gas Company, Central Illinois Light Company, and Iowa-Illinois Gas & Electric Company. These companies serve some 2,500,000 consumers of electric light and power.

On November 27, 1961, the Attorney General of Illinois sought to intervene in these proceedings on behalf of the consumers of electrical power in Illinois and on behalf of the State of Illinois, its agencies and public institutions, as consumers of electrical power supplied by these companies. On May 17, 1962, six months later, the District Court denied the petition for intervention, on the ground that the decision in these cases would not be *res judicata* as to the interests of the State and the people thereof and on the ground that

the rates for consumers having been fixed by the Illinois Commerce Commission the consumers have no remedy for overcharges attributable to violations of the federal antitrust laws.

The Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court but rested its judgment solely on the ground that the State of Illinois and the consumers of electrical power in the State "do not have any direct personal or pecuniary interest in these antitrust actions." It is from this judgment that the State of Illinois seeks relief from this Court by way of petition for certiorari.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals, in holding that the consumers of electric power in Illinois had no claim under the antitrust laws for the increased costs directly resulting from the excessive charges made by the manufacturers to the utilities, relied solely on *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156 (1922), and thus misconstrued and misapplied a decision of this Court, seriously distorting the law on a question of great importance to the administration of the antitrust statutes.

The *Keogh* case is clearly inapposite. There the charge was that the rates fixed by the Commerce Commission were themselves in violation of the antitrust laws because they were non-competitive. The alleged violations of the antitrust laws were there said to have been committed by the utilities in joining for the purpose of getting the rates made uniform. There is no claim in the instant case of the illegality under the antitrust laws of the rates fixed by the utilities commission. The contention of the State here is rather that the manufacturers—not the utilities—caused loss to the consumers by reason of the illegal price-fixing

activities that caused the utilities to pay higher costs, which higher costs were made part of the rate base and of operating expenses necessarily resulting in increased costs to the consumers.

The *Keogh* case rested in large measure on the proposition that the relief sought by the plaintiff would result in granting a preference of rates to the plaintiff which would clearly contradict the purpose and function of uniformity of rates fixed by the commission. Here there could be no such discriminatory result as dictated the result in *Keogh* since the State is acting on behalf of all the consumers in Illinois. The nature of this distinction and its importance is emphasized in *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500 (1936), and *United States* v. *R. C. A.*, 358 U. S. 334, 337 (1959).

Keogh finally rested on the proposition that damages were speculative because there was no way of showing that the costs to the plaintiff there would have been lower in the absence of the alleged violation of the antitrust laws or that his profits would have been greater, since plaintiff's competitors would have fared equally well had the rates not been fixed. In the instant case the record and court below concede that the consumers of Illinois suffered increased costs as a result of the higher prices exacted from the utilities by the manufacturers in violation of the antitrust laws.

2. The Court of Appeals erroneously decided a novel and important question under the antitrust laws, *i.e.*, that injuries to consumers by reason of illegal price-fixing imposed on utilities are not compensable under the antitrust laws.

It might well be true that, in some instances, a violation of the antitrust laws by manufacturers that causes an increase in the price charged to dealers would give rise to no

claim on the part of the consumer. This Court has yet to treat of the problem. But, if this is the appropriate doctrine in some instances, it must be for one of two reasons. Either the illegal increase in price might be absorbed by the dealer and never passed on to the consumer or the consumer may be in a position to make purchases from another dealer who was not similarly imposed upon or who chose to absorb the cost of the illegal increase. In the instant case, however, the public utility consumer has no possibility of avoiding the imposition. The utility is itself a legal monopoly from whom the consumer must purchase his electric power if he is to get it at all. And the increased costs of equipment attributable to the violations of the antitrust laws have necessarily been included in the utility's operations, resulting directly in an increase in costs to the public utility customer represented by the petitioner herein. The lower courts remain uninstructed by this tribunal on the question when, if at all, consumers may assert their rights under the antitrust laws. This case affords a most appropriate vehicle for resolving that issue.

3. The Court of Appeals erroneously required the demonstration of a "direct personal or pecuniary interest in these antitrust actions" by the intervening consumers, which is equated with a showing of "direct proximate impact of the conspiracies on the consumers." By apparently requiring a direct purchaser relationship with the selling defendants, the Court of Appeals would deny protection to injured indirect purchasers of electrical equipment who were intended to be protected by the antitrust laws. These injured parties secured their electrical equipment through contractors who made direct purchases at conspiratorially fixed prices from the defendants and included such excess prices in the bids submitted to and accepted by the injured public or private agencies involved.

4. The lower court was patently in error in holding that because the rates imposed on the consumers were legally fixed by the Illinois Commerce Commission, the injury to the consumers was "not cognizable in these antitrust actions." In so holding, the Court of Appeals was in direct contradiction of the cases decided by this Court. Indeed, if it were not for the language of the Court of Appeals' decision it would be hard to believe that the decision asserted that the approval by the State utility commission conferred on the manufacturers an immunity against suit by the consumers. Not even national administrative agencies have been permitted to subvert the antitrust laws by their interposition, unless specifically sanctioned by Congress. See, *e.g.*, *United States* v. *Philadelphia National Bank*, 31 U. S. Law Week 4650 (June 17, 1963); *United States* v. *R. C. A.*, 358 U. S. 334 (1959). It is hard, therefore, to comprehend the proposition that such immunity can be conferred by a state administrative agency.

5. The denial of intervention by the State of Illinois is in direct contravention of the purpose and function of Rule 24 promulgated by this Court, for intervention affords the State the sole avenue for protection of its interests and that of the consumers it represents.

It must be clear that unless the State of Illinois is permitted to intervene, the persons injured by the price-fixing conspiracy to which the defendants were parties will remain without remedy. For if the liability of the defendants is established, and the State is not permitted to intervene, one of two equally undesirable results must be brought about. In the event that the "passing on" defense were to succeed, the defendants would be permitted to avoid obligation for their violations of the antitrust laws by showing that the plaintiffs had been made whole by reason of their

inclusion of the additional costs in their rate base and operating expenses. In this event, the defendants in effect would be in position to say that the loss resulting from their wrongdoing was borne by the consumers and thus defendants need not reimburse the plaintiffs.

Admittedly, it is not clear that such a defense will succeed. The circuits are in direct conflict on the issue whether the "passing on" defense is a valid one in an antitrust suit. The Third Circuit has clearly held that it is not. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 281 F. 2d 481 (CA 3rd, 1960). The Ninth Circuit has held that such a defense is valid. *Wolfe* v. *National Lead Co.*, 225 F. 2d 427 (CA 9th, 1955); see also *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F. 2d 580 (CA 8th, 1945).

In the event that it does not succeed, however, an equally undesirable result will necessarily follow, if the State is not made a party to the action. For then the utilities will be able to recover damages from the defendants for which they have already been made whole by their charges to the consumers represented by the State. They will thus receive not only treble damages from the defendants, but treble damages for a loss they did not suffer. And the only persons to have suffered a loss will be the consumers and they, by reason, of the action of the lower courts will not be permitted to recoup that loss at all. They could not be made whole by amendment of the rates to be charged in the future, for in fixing such rates the state utility commission is constitutionally forbidden to consider past profits or excess revenues. *Board of Public Utility Commissioners* v. *New York Tel. Co.*, 271 U. S. 23, 32 (1926). And the state commission's power to award reparations for excessive rates is confined to a one year limitation period. Ill. Rev. Stats. (1961), Ch. 111-2/3, § 76.

6. The Court of Appeals by requiring that the petitioner demonstrate that it can "bring a direct action against defendants" as a condition to the right to intervene in its somewhat cryptic opinion appears to embrace the proposition of the trial court that intervention must be denied because the State will not be bound by the judgment. Such reasoning is circular. *Res judicata* can serve as a bar only to persons who are parties, or privies to litigation. Thus every person seeking intervention can be denied access to the court on the ground that the action proceeding to judgment without him will not serve as *res judicata*. More important, however, is the fact that the district court's position is in direct conflict with the rulings of several circuits that have seen and rejected the fallacy of requiring that a person be denied intervention if the judgment will not be *res judicata*, including the Seventh Circuit. See, *e.g.*, *Clark* v. *Sandusky*, 205 F. 2d 915, 919 (CA 7th, 1953); *Ford Motor Co.* v. *Bizanz Bros., Inc.*, 249 F. 2d 22, 28 (CA 8th, 1957); *Kozak* v. *Wells*, 278 F. 2d 104, 110 (CA 8th, 1960).

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June 24, 1963.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT.
For the Northern District of Illinois.
Eastern Division.

Commonwealth Edison Company, et al., *Plaintiffs*, vs. Allis-Chalmers Manufacturing Company, et al., *Defendants*, and related cases.	Civil Actions Nos. 61-C-1277 to 1285.
Central Illinois Light Company, et al., *Plaintiffs*, vs. Allis-Chalmers Manufacturing Company, et al., *Defendants*, and related cases.	Civil Actions Nos. 61-C-1688 to 1696.

MEMORANDUM ON MOTION OF THE STATE OF ILLINOIS TO INTERVENE AS PARTY PLAINTIFF.

These 18 actions filed by several electric public utilities seek treble damages under federal antitrust laws. The separately grouped defendants are charged with conspiratorial price fixing resulting in the establishment of higher non-

competitive prices in the sale of electrical equipment to the plaintiffs. The cases involved in the instant motion comprise two series filed along nine product lines covering power transformers, power switchgear assemblies, low-voltage power circuit breakers, distribution transformers, meters, condensers, circuit breakers, turbine-generator units, and power switching equipment. Four of the plaintiff utilities operate in Illinois. They are Commonwealth Edison Company, Central Illinois Electric & Gas Co., Central Illinois Light Co., and Iowa-Illinois Gas & Electric Co. (hereinafter referred to as plaintiffs).

Intervention is sought by the Attorney General of Illinois (1) on behalf of the citizens of the State, who were consumers of the four plaintiffs, to secure refunds out of any recoveries realized herein, and (2) on behalf of the State of Illinois, its agencies and public institutions, to present claims for damages allegedly involving questions of law and fact in common with those of the main actions.

INTERVENTION AS OF RIGHT.

The State of Illinois contends that the recovery of damages by these plaintiffs will create a fund for distribution subject to the disposition of this Court and in which plaintiffs' consumers have a direct interest. It further contends that by reason of this fund, it is entitled to intervene in behalf of the consumers as a matter of right because (1) the representation of the consumer interest by existing parties may be inadequate, and (2) the consumers may be bound by a judgment or order in this action.

The applicable part of Rule 24, Federal Rules of Civil Procedure states:

> "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inade-

quate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

The State's theory as to the existence of the "fund" is that the rates and charges for services paid by the consumers were excessive because said rates were based, in part, upon plaintiffs' capital expenditures for electrical equipment for which excessive prices had been conspiratorially fixed. It concludes that that part of a recovery herein which is in the excess over a reasonable rate, constitutes a "fund" in which plaintiffs' consumers have an interest.

The State does not earnestly argue that the consumers will be bound by any judgment or order herein and readily admits that "plaintiffs' consumer-customers are not parties to this suit and, therefore, under the principles of *res judicata* are not bound, . . ." Its principal contention is predicated on the existence of a fund which it alleges is subject to the disposition of this Court. It is clear that the existence and amount of this "fund" must depend on a determination of what was a reasonable and legal rate during the period of the alleged conspiracy.

Since the plaintiffs are public utilities, they are subject to the jurisdiction of the Illinois Commerce Commission under the provisions of the Public Utilities Act, S. H. A. Ch. 111 2/3. The exclusive power for fixing reasonable rates lies in that body subject to the provided statutory review by the Illinois courts (*Peoples Gas Light Co.* v. *Slattery*, 373 Ill. 31 (1939); *Natural Gas Pipeline Co.* v. *Federal Power Comm'n*, 141 F. 2d 27 (7th Cir. 1944); *Tilney* v. *City of Chicago*, 134 F. 2d 682 (7th Cir. 1943)). If rates are alleged to be excessive or improper in any respect, com-

plains must be made to the State commission. There is a specific Illinois statute providing for recovery of "excessive" rates. The Public Utilities Act, § 72, S. H. A. Ch. 111 2/3, § 76, provides in part:

> "When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount."

The law is well settled in Illinois that the statutory remedy for reparations is the exclusive remedy of customers of a public utility who allege that the utility's rates are excessive (*Mandel Bros.* v. *Chicago Tunnel Term. Co.*, 2 Ill. 2d 205 (1954); *Terminal R. R. Ass'n.* v. *Pub. Utilities Comm'n.*, 304 Ill. 312 (1922), *Burke* v. *Illinois Bell Tel. Co.*, 348 Ill. App. 529 (1952); *American Generator & Armature Co.* v. *Commonwealth Edison Co.*, 298 Ill. App. 192 (1939); *Medusa Portland Cement Co.* v. *Ill. Cent. R. R.*, 287 Ill. App. 549 (1936); *Natural Gas Pipeline Co.* v. *Federal Power Comm'n., supra; Tilney* v. *City of Chicago, supra*).

In *Medusa Portland Cement Co.* v. *Ill. Cent. R. R. supra*, the Court stated the rule thus (at p. 561):

> "Since the enactment of the Public Utilities Act, sec. 72 thereof has provided the only method or remedy available in this State for determining whether rates charged by public utilities are fair and reasonable or unfair, unreasonable and discriminatory. This section of the act also authorizes the commission to award reparation to claimants if rates charged and exacted

of them are determined to have been excessive and discriminatory."

After citing several cases to the same effect, the Court, continuing, said (at p. 563):

> "It is manifest from these decisions, and they but follow the decisions of the United States Supreme Court construing similar provisions of the Interstate Commerce Act, that *no suit may be maintained in any court in Illinois to recover reparation for excessive or unjustly discriminatory rates unless and until the commission, acting under the authority conferred upon it by sec. 72, has heard a claim therefor, has found the rates the public utility charged to have been excessive or unjustly discriminatory, and has entered an order requiring the public utility to make due reparation.*" (Emphasis added.)

The Court in both *Burke* v. *Illinois Bell Tel. Co., supra,* and *American Generator & Armature Co.* v. *Commonwealth Edison Co., supra,* found support for the Illinois rule in a quotation from *Great No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285 (1922), where the Court stated thus (at p. 291):

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two

> classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

Inasmuch as the State seeks intervention of right on behalf of plaintiffs' consumers, it is evident that its rights cannot rise above theirs. The situation where a consumer seeks to reach a "fund" resulting from allegedly excessive rates charged by a utility is not novel in this Circuit. In *Natural Gas Pipeline Co.* v. *Federal Power Comm'n*, *supra*, the original suit arose by the petition of Natural Gas Pipeline Company for review of an order of the Federal Power Commission to reduce its rates. The Court of Appeals issued a stay order pending review, upon a bond filed to protect purchasers of gas at rates in excess of those prescribed by the Commission. Subsequently Natural Gas Pipelines Company filed reduced rates with the Commission, and in satisfaction of its obligation under the stay order, paid into court the six million dollar fund which had accumulated during the period of said stay order. Ultimately the fund was decreed to belong to the consumers of the several utilities to whom Natural Gas Pipeline Company furnished natural gas. After the fund had been distributed, a customer of Peoples Gas Light and Coke Company sought intervention for himself and all other customers similarly situated. Petitioner in that suit contended that since the cost of natural gas purchased by Peoples Gas from Natural Gas Pipelines Company had been reduced, and Peoples Gas had not reduced its retail rate pro tanto, he and other consumers were entitled to a refund

from Peoples Gas measured by said reduction. In dismissing the petition, the Court significantly said (at p. 29):

> "What petitioner now asks, is to have this court ascertain that there were excess collections from him and the amount thereof. But the only way that we could do this would be to usurp the functions of the Illinois Commerce Commission by fixing what we consider would have been a reasonable rate for Peoples Company to charge during the period in question, and the specific classes or classes of customers entitled to a refund by reason of the Company's charges in excess thereof. We refuse to do so because this court has no rate-making powers. [Citing cases.]"

Considering the exclusiveness of the statutory remedy for excessive rates, the similarity between the situation of the instant applicant and that of petitioner in Natural Gas Pipeline, and the binding authority of that case, this Court must conclude, as did the Court of Appeals in the latter case, that "The 'fund' or 'trust fund' which petitioner seeks to conjure up is entirely illusory."[1]

Judge Kilpatrick in *City of Philadelphia, et al.* v. *Westinghouse Electric Corp., et al.* (decided October 23, 1961) (D. C. E. D. Pa.) 1961 C. C. H. Trade Cases, ¶70, 143, in denying intervention to the State Public Utility Commission, said:

> "I think . . . that the consumer's interests, which are the only bases on which the application could be sustained, are entirely too remote to permit intervention in this case . . . I will deny the motion to intervene."

The motion as to intervention of right is denied.

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[1] See annotation, 18 A. L. R. 2d 1343 (1951), "Right of customers of public utility with respect to fund representing a refund from another supplying utility upon reduction of latter's rates."

PERMISSIVE INTERVENTION

The State of Illinois seeks to intervene as a purchaser of electrical equipment and contends that the State's claim and that of the main actions have questions of law and fact in common. The applicable part of Rule 24 Federal Rules of Civil Procedure is stated thus:

> "(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . *In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.*" (Emphasis added.)

A motion for permissive intervention is addressed to the sound discretion of the Court (*Sutphen Estates* v. *United States*, 342 U. S. 19 (1951); *Allen Calculators, Inc.* v. *Cash Register Co.*, 322 U. S. 137 (1944)). Although it is certainly not conclusive, the opposition of all the original parties to the main action to intervention is an element for the Court's consideration. The words of Rule 24(b) as underscored above are a caution to the Court so that in its zeal to avoid a multiplicity of suits it will not hamper or vex the claims of the original parties.

While it is apparent that the State's claim as to the issue of the conspiracy will present questions of law and fact in common with the main actions, this is not true as to the question of damages. Even assuming for the moment that defendants did engage in a conspiracy, each plaintiff herein must prove that it was damaged in its own property or business by paying higher prices and, lacking such proof, it cannot recover (*Keogh* v. *C. & N. W. Ry.*, 260 U. S. 156 (1922); *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F 2d 967 (7th Cir. 1943)).

The State avers it has purchased, acquired, and used millions of dollars of electrical equipment in the operation

of: 73 hospitals, sanitoria, clinics, and schools, 5 penal institutions, 11,932 miles of highways, 167 miles of expressways and 87 miles of toll roads using extensive electrical structures, facilities, and devices; 65 state parks, lodges, facilities, and fair grounds, plus armories, office and service buildings. The applicant readily admits that "additional trial time will be involved." The size and complexity of the instant two series of cases are manifest. When it is considered that the State intends to bring to suit claims as to an enormous number of purchases, requiring separate proof of damages, including the time, amount and nature of, and prices paid for the purchases made, it is plain that the instant suits will approach unmanageable proportions both in preparation and trial. Applicant further admits that intervention will involve a proportionate increase in the number of witnesses required. A similar situation was aptly characterized by Judge Wyzanski in *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore*, 51 F. Supp. 972 (D. C. Mass. 1943), where he said (at p. 973):

> "Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair."

The Court has carefully weighed and examined all the factors involved and is of the opinion that to permit intervention by the State will unduly delay and prejudice the adjudication of the rights of the original parties.

The motion for permissive intervention on behalf of the State of Illinois is therefore denied, and counsel for plaintiffs will prepare the necessary order.

EDWIN A. ROBSON,
Judge.

May 17, 1962

APPENDIX B.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 13904. SEPTEMBER TERM, 1962 JANUARY SESSION, 1963

Commonwealth Edison Company, et al.,
Plaintiffs-Appellees,
vs.
Allis-Chalmers Manufacturing Company, et al.,
Defendants-Appellees,
and
State of Illinois,
Appellant-Applicant for Intervention.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 1, 1963

Before HASTINGS, *Chief Judge*, KNOCH and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. Among the plaintiffs in eighteen related antitrust suits filed below charging defendants, electrical equipment manufacturers, with conspiracy to fix prices, allocat[illegible] markets and submit collusive bids, are four public utilities operating in the State of Illinois, namely,

Commonwealth Edison Company, Central Illinois Electric and Gas Co., Central Illinois Light Company and Iowa-Illinois Gas and Electric Company. (These four Illinois public utilities will hereinafter be referred to as plaintiffs). Plaintiffs serve some 2,500,000 consumers with electric light and power.

The district court's original jurisdiction was invoked under Section 1 of the Sherman Act and Sections 4, and 5(b) of the Clayton Act (15 U. S. C. §§ 1, 15, and 16(b)). The effect of these price fixing conspiracies, it is alleged, was the creation of "high and artificial levels" of prices for the electrical equipment purchased by plaintiffs. All of these cases arise out of the so-called Philadelphia Electrical Conspiracy Cases.

The Attorney General of Illinois seeks to intervene in these proceedings for the State of Illinois. Intervention is sought as of right in order to represent and protect the interests of the public consumers of plaintiffs who it is claimed were injured by defendants' price fixing conspiracies in that plaintiffs were caused to pay high and artificial prices for electrical equipment used in its utility operations, which excessive prices were in turn collected from the public consumers through higher utility rates.

The State of Illinois in support of its motion for intervention urges that it has in behalf of the public consumers a direct interest in the recoveries which may be realized in these proceedings and that its participation is necessary to effectuate a proper and equitable distribution among the injured parties of any monies or fund so recovered. It is further urged that, "The representation of this public interest by existing parties may be inadequate and the applicant may be bound by a judgment or order in the action."

Permissively, the Attorney General seeks to intervene on behalf of state agencies and institutions which have made purchases from defendants of the involved electrical equipment during the period of the conspiracy. It is alleged that the claims arising from these purchases present questions of law and fact which are common to the main action.

Both plaintiffs and defendants oppose the motion of the State of Illinois to intervene.

The district court denied the State's application for intervention both as of right and permissively. The district judge's memorandum stating his reasons for the ruling appears in 207 F. Supp. 252.

This appeal was taken in the first of these eighteen related cases under a stipulation among the parties that this court's determination in this appeal shall govern the matter of intervention by the State of Illinois in all of the related cases.

1. Intervention As of Right.

We agree that the district judge was correct in not allowing the State of Illinois by its Attorney General to intervene in behalf of the consumers of the four public utility plaintiffs; we reach that result, however, for a different reason.

The primary essential element that must exist for an applicant to intervene in a pending action as of right under Rule 24(a) Fed. R. Civ. P. is that he have a direct personal or pecuniary interest in the subject of the litigation; in this, the mandatory provisions differ from the permissive under Rule 24(b) Fed. R. Civ. P. See *Securities Comm'n. v. U. S. Realty Co.*, 310 U. S. 434, 459 (1940). All other essential elements, *i. e.*, "representation of the ap-

plicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action" (Rule 24(a)(2)), as well as "the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court. . . ." (Rule 24(a)(3)), are secondary to the existence of a direct personal or pecuniary interest in the subject of the litigation by the applicant for intervention as of right.

We hold that the State of Illinois as agents or *parens patriae* of the consumers (accepting arguendo that the State of Illinois can properly assume such role) or even the consumers themselves do not have any direct personal or pecuniary interest in these antitrust actions. Our holding renders moot any discussion of the existence of the subsumed secondary elements. The rationale for our holding follows.

The interests of plaintiffs and the consumers are different and arise from separate though related operative facts. The legal interest of plaintiffs which they are attempting to vindicate in these actions arises under the federal antitrust statutes. The damages, if any, to which they are entitled are measured by the hurt they may have suffered by reason of the alleged conspiracies claimed to be violative of the antitrust laws. That hurt is measured by the excessive prices they claim were paid for equipment purchased from defendants. The alleged conspiracies spent themselves on these purchasers. The aftereffects of the hurt on the consumers are consequential and too remote for the consumers to gain rights against the conspirators.

The consumers' rights, if any, to reparation for their consequential hurt arise from higher rates and charges for services provided by plaintiffs. That is the proximate

cause of their injury, not the antitrust violation. See *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1922). The consumers' rights do not penetrate through to the antitrust conspiracies.

To put it differently, the question whether the State of Illinois, in behalf of the consumers, can as of right intervene may be answered by posing another question which underlies and is vital to the first. The underlying question is: Could the State of Illinois bring a direct action against defendants? The answer is "no", because there was no direct proximate impact of the conspiracies on the consumers. The impact on them was remote and took the shape of allegedly higher rates paid for utility services—rates established as legal by the Illinois Commerce Commission. Although these rates may be determined to have been unreasonable because of conspiratorially fixed equipment costs which went into the basic rate structure, that is another issue not cognizable in these antitrust actions.

We do not feel called upon to determine whether such issue embraces legally vindicable rights possessed by the consumers or what means of recovery, if any, should be pursued. All we are deciding is that the consumers' rights may not be asserted in these antitrust actions.

The State of Illinois, by asking to intervene in behalf of the consumers, is in effect attempting under the guise of intervention to substitute itself in the role of protector of the consumers' interests for plaintiffs, in part at least, as the aggrieved party in these antitrust actions; or what seems more likely, is tendering a collateral issue having its genesis outside the antitrust laws.

In either event, the asserted mutuality of antitrust interest is lacking; hence, the State of Illinois fails to satisfy the mandatory intervention prerequisites of Rule 24 Fed. R. Civ. P.

II. Permissive Intervention.

We find no abuse of discretion in the district court's denial of the State of Illinois' motion for permissive intervention as a purchaser of defendants'-products that has suffered damage by reason of the alleged conspiracies. In support of its motion to intervene, the State claims common issues of law and fact. As stated by the district judge in his memorandum, "While it is apparent that the State's claim as to the issue of the conspiracy will present questions of law and fact in common with the main actions, this is not true as to the question of damages."

The State may start an independent action against defendants if it chooses. At that time the district court may decide in its sound discretion whether the State's action should be consolidated for trial with the pending actions.

The order denying the motion of the State of Illinois to intervene as a party plaintiff, both as of right and permissively, is Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

STATE OF ILLINOIS,
Petitioner

vs.

COMMONWEALTH EDISON COMPANY, et al,
Respondents-Plaintiffs,

and

ALLIS-CHALMERS MANUFACTURING COMPANY, et al,
Respondents-Defendants

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS-PLAINTIFFS IN OPPOSITION

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	4
Conclusion	8

CITATIONS

Cases:

Keogh v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922) 4, 5, 6, 7

Philadelphia Electric Co. v. *Westinghouse Electric Corporation*, 1961 CCH Trade Cases par. 70,143 (E.D. Pa. October 23, 1961), affirmed 308 F.2d 856 (3d Cir. 1962), certiorari denied, 372 U.S. 936 (1963) 5

Terminal Warehouse Co. v. *Pennsylvania Railroad Co.*, 297 U.S. 500 (1936) 5

United States Navigation Co., Inc. v. *Cunard Steamship Co., Ltd.*, 284 U.S. 474 (1932) 4

Statutes:

Clayton Act:

Section 4 2

Federal Rules of Civil Procedure:

Rule 24 ..... 2, 6, 7

Rule 24(a) 2, 4, 7

Rule 24(a)(2) 8

Rule 24(b)(2) 2

PAGE

Sherman Act:

Section 1 3

1961 Illinois Revised Statutes, Chapter 111⅔ (Illinois Public Utility Act):

Section 8 10

Section 9 10

Section 35 11

Section 37 12

Section 39 12

Section 41 12

Section 64 13

Section 67 14

Section 72 14

Section 76 15

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OPINIONS BELOW

The opinion of the district court (Pet. 11-19) is reported at 207 F. Supp. 252. The opinion of the court of appeals (Pet. 20-25) is reported at 315 F.2d 564.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1963. The petition for a writ of certiorari was filed on June 25, 1963. Petitioner is invoking the jurisdiction of this Court under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the two courts below were correct in holding that petitioner, having failed to meet the specific requirements of Rule 24(a) of the Federal Rules of Civil Procedure, may not intervene of right in these actions as the claimed representative of consumers of the respondents-plaintiffs doing business in Illinois.[1]

STATUTES INVOLVED

Federal Rules of Civil Procedure:

> Rule 24. *Intervention.*
>
> (a) [as amended December 27, 1946, effective March 19, 1948] *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof . . . .
>
> (28 U.S.C. 1958 ed., Rule 24.)

Clayton Act:

> Section 4. *Suits by persons injured; amount of recovery.*

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[1] In the courts below, a second issue raised by petitioner was whether it was entitled to intervene permissively under Rule 24(b)(2) of the Federal Rules of Civil Procedure as a purchaser of electrical equipment. The district court denied petitioner's motion to so intervene and the court of appeals held that the trial court had not abused its discretion. This issue is not raised in the petition for writ of certiorari so that this Court's review is not sought with respect to it.

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> (15 U.S.C., Section 15.)

The pertinent provisions of the Illinois Public Utilities Act are set forth in the Appendix, infra, pp. 10-16.

STATEMENT

The pertinent facts may be set forth as follows:

On July 31, 1961, and October 6, 1961, the respondents-plaintiffs, all of which are investor-owned public utilities, brought eighteen related actions in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to recover treble damages under the antitrust laws of the United States in connection with purchases of electrical equipment from the respondents-defendants. It is alleged in the complaints that each plaintiff, as a purchaser of a designated type of electrical equipment, was injured as a result of a combination and conspiracy, in violation of Section 1 of the Sherman Act (15 U.S.C. §1), among certain manufacturers of such equipment. The conspiracy alleged is the fixing of prices, allocation of markets and submission of collusive bids with the effect that higher levels of prices were paid by the plaintiffs for the electrical equipment than would have been paid absent such conspiracy. (R. 4-17.)[2]

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[2] "R" references are to the separate appendix to the petitioner's brief in the United States Court of Appeals for the Seventh Circuit.

On November 24, 1961, petitioner filed motions for leave to intervene as a party plaintiff in these actions as a claimed representative of the consumers of the public utilities doing business in Illinois.[3] (R. 18-19.)

All respondents (both plaintiff and defendants) opposed the petitioner's motions to intervene. They contended, among other things, that petitioner failed to meet the requirements of Rule 24(a) of the Federal Rules of Civil Procedure.

The district court disallowed petitioner's motions to intervene and the court of appeals affirmed. Both courts held that petitioner was not entitled to intervention of right under Rule 24(a), having failed to come within the terms of that Rule.

ARGUMENT

Rule 24(a) of the Federal Rules of Civil Procedure sets forth the requirements for intervention of right in actions pending in the federal district courts. The question presented to the courts below was whether the petitioner had met these requirements. The negative holdings of both courts do not create a conflict of circuits or other ground warranting review by this Court. Moreover, the issue was resolved correctly by the two courts below.

1. A primary requirement of Rule 24(a) is that the applicant have an "interest" in the subject of the litigation. It is well settled that consumers of regulated utilities have no standing under the antitrust laws to maintain actions for injuries to the utilities. (*Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922); see also, *United States Navigation*

[3] Of the nine plaintiff utilities in these actions, four operate in the State of Illinois. All four are subject to the jurisdiction of the Illinois Commerce Commission.

Co., Inc. v. *Cunard Steamship Co., Ltd.*, 284 U.S. 474 (1932); *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U.S. 500 (1936)) and hence lack the requisite "interest" to intervene in antitrust actions brought by the utility (*Philadelphia Electric Co.* v. *Westinghouse Electric Corp.* (and related cases); 1961 CCH Trade Cases Par. 70,143 (E.D. Pa. October 23, 1961); affirmed, 308 F.2d 856 (3d. Cir. 1962), certiorari denied, 372 U.S. 936 (1963)).

In the *Keogh* case, a shipper brought an action for treble damages, alleging that certain railroads had violated the Sherman Act by agreeing upon rate increases and that such agreed-upon rates were higher than the rates would have been "if competition had not been thus eliminated." All of the relevant rates had been approved by the Interstate Commerce Commission. In an opinion by Justice Brandeis, this Court denied recovery of damages, holding that the legal rights of the shipper are measured by the published tariff and that since the shipper had paid the published rates, it could not claim injury in its business or property within the meaning of the antitrust laws. In the instant case, it is not disputed that the rates paid by consumers of the respondent-plaintiff utilities were the legal rates established by the Illinois Commerce Commission.

In the *Westinghouse Electric Corp.* cases (*Philadelphia Electric Co.* v. *Westinghouse Electric Corp.* (and related cases), 1961 CCH Trade Cases par. 70,143 (E.D. Pa. October 23, 1961), affirmed, 308 F. 2d 856 (3d Cir. 1962), certiorari denied, 372 U.S. 936 (1963)), the Public Utility Commission of the State of Pennsylvania, acting as agent or representative of electricity consumers, was denied leave to intervene in the antitrust treble damage actions brought by the Philadelphia Electric Company against manufacturers of electrical equipment. The courts held that the con-

sumers and hence the Utility Commission could not establish the requisite "interest" for invoking the provisions of Rule 24.

Clearly, the consumers whom the petitioner purports to represent in these cases have no "interest" in the subject matter of the litigation in which intervention is sought and, accordingly, the petitioner as their representative has no such "interest."[4]

Petitioner (Pet. 5-6) misconceives the *Keogh* holding. *Keogh*, as noted, stands for the proposition that any injury to utility consumers in a situation like the present could only arise from unduly high rates and charges for services provided by the utility, not from antitrust violations. Petitioner's treatment (Pet. 5-6) of factual differences between *Keogh* and the case at bar is irrelevant. Petitioner's assertion (Pet. 7) that the "lower courts remain uninstructed by this tribunal on the question when, if at all, consumers may assert their rights under the antitrust laws" is clearly incorrect in the light of *Keogh*.

2. In an attempt to gain intervention of right irrespective of the specific requirements of Rule 24(a), petitioner argues

---

[4] Further, contrary to petitioner's suggestion (Pet. 6 and again at Pet. 8 by inference), there is nothing in the record or in the opinion of the court below conceding that the consumers paid increased rates as a result of the alleged price fixing conspiracy of the respondents-defendants. In fact, the court below stated (Pet. 24): "Although these rates [established as legal by the Illinois Commerce Commission] may be determined to have been unreasonable because of conspiratorially fixed equipment costs which went into the basic rate structure, that is another issue not cognizable in these antitrust actions." To determine the extent, if any, to which prices paid for equipment involved in these cases affected various rate bases and depreciation allowances and, therefore, rates to consumers, would require a detailed examination of each component of such rate bases. No such examination has been made here. Obviously, a properly authorized regulatory agency, in this case the Illinois Commerce Commission, is the appropriate body to undertake such examinations if it becomes necessary to do so.

that intervention in these cases is the sole avenue for protection of its interests and that of the consumers. (Pet. 8-9.)

The difficulty with this position is, first of all, that it fails to recognize that Rule 24 does not confer rights or interests which otherwise do not exist. As the court of appeals observed (Pet. 24): "To put it differently, the question whether the State of Illinois, in behalf of its consumers, can as of right intervene may be answered by posing another question which underlies and its vital to the first. The underlying question is: Could the State of Illinois bring a direct action against defendants? The answer is 'No'. . . ." Clearly, the State could not since the consumers whom it seeks to represent have no standing to sue.

The contention (Pet. 9) that if intervention is not allowed respondents-plaintiffs will benefit from any recovery to the exclusion of the consumers who have allegedly borne the loss is irrelevant and not the subject of this litigation as the *Keogh* case makes clear.[5] To suggest that it is rele-

[5] We note that petitioner misconceives the scope of the Illinois Public Utilities Act and the nature of the rate-making process. Rates are not automatically increased to reflect plant additions such as those which were the subject of purchases by the plaintiffs from the defendants. Further, the Illinois Commerce Commission clearly has authority to deal adequately with the interests of the consumers which might arise as a result of these cases. The pertinent provisions of the Illinois Public Utilities Act by which this authority is granted are set forth in the Appendix, infra, pp. 10-16. The constitutional inhibition against reliance upon past profits or excess revenues as a justification for lower utility rates is not relevant here, where plaintiffs may in the future recover substantial amounts from the defendants which the Commission may then direct the plaintiffs to account for as state regulatory policies suggest is appropriate. Similarly, it is not responsive to cite state statutory inhibitions against reparations covering a lengthy period of past time when in addition to its authority to order refunds under some circumstances, the Commission may fashion rate and accounting orders (after expert study of complicated circumstances) which afford "just and reasonable" future treatment to rate payers.

vant is to suggest that a consumer or representative of consumers may intervene in any case in which a public utility stands to lose or recover a sum of money. Such a proposition is manifestly indefensible here as in any such case.

3. Petitioner's argument (Pet. 10) that the court of appeals has misconstrued the so-called *"res judicata"* requirement of Rule 24(a)(2) is a patent effort to conjure up reasons for review by this Court. The court of appeals specifically stated in its opinion (Pet. 23-23) that it was unnecessary for it to reach the question of whether "the applicant is or may be bound by a judgment in the action" and hence never passed on this matter. The district court simply stated in its memorandum opinion (Pet. 13) that: "The State does not earnestly argue that the consumers will be bound by any judgment or order herein and readily admits that 'plaintiffs' consumer-customers are not parties to this suit and, therefore, under the principles of *res judicata* are not bound . . . '."

CONCLUSION

The decisions below do not announce any new or important principles of law, do not create a conflict among circuits, and do not deal with questions of basic importance in the administration of the antitrust laws. For these

reasons, the petition for a writ of certiorari should be denied.

Respectfully sumitted,

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July 1963

APPENDIX

1961 Illinois Revised Statutes, Chapter 111⅔:

Section 8. [as amended by act approved July 8, 1955, L. 1955, p. 1242] *Supervision of utilities—Examination —Non-public business of utility—Rules and regulations —Hearings pending legislation—Report of Commission.*

The commission shall have general supervision of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this Act and any other law, with the orders of the commission and with the charter and franchise requirements.

* * * * * * * * *

The commission shall have power to adopt reasonable and proper rules and regulations relative to the exercise of its powers, and proper rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings, and to alter and amend the same.

* * * * * * * * *

Section 9. *Utilities to comply with requests and to obey orders of commission.* Every public utility shall furnish to the Commission all information required by it to carry into effect the provisions of this Act, and

shall make specific answers to all questions submitted by the Commission.

* * * * * * * * *

Whenever required by the Commission, every public utility shall deliver to the Commission, any or all maps, profiles, reports, documents, books, accounts, papers and records in its possession, or in any way relating to its property or affecting its business, and inventories of its property, in such form as the Commission may direct, or verified copies of any or all of the same.

Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the Commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees.

[The Commission has the broadest authority over the establishment, form, auditing and inspection of accounts of the Illinois public utilities including specifically depreciation accounts and the appropriate ite or rates of depreciation to be allowed each utility under its jurisdiction. (Sections 11 to 19 inclusive.)]

Section 35. *No service to be rendered until schedules filed and published.*

No public utility shall undertake to perform any service or to furnish any product or commodity unless or until the rates and other charges and classifications, rules, and regulations relating thereto, applicable to such service, product or commodity, have been filed and published in accordance with the provisions of this Act * * *

Section 37. *Charging more or less than published rates.*

Except as in this Act otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product, or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time, * * * nor shall any public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates or other charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons.

Section 39. *Discrimination—Rebates—Free passage of commission members and employees.*

No public utility, or any officer or agent thereof, or any person acting for or employed by it, shall directly or indirectly, by any device or means whatsoever, suffer or permit any corporation or person to obtain any service, commodity, or product at less than the rate or other charge then established and in force as shown by the schedules filed and in effect at the time. * * * *

Section 41. *Commission to fix rates and regulations.*

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, contracts,

or practices, or any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

The Commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof.

Section 64. *Investigations and hearings.*

The Commission, or any commissioner, assistant commissioner, or officer of the Commission designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of the Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the Commission may establish. In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner, assistant commissioner or officer of the Commission shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner, assistant commissioner or any officer of the

Commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission. All hearings conducted by the Commission shall be open to the public.

* * * * *

[Section 64, 1961 Illinois Revised Statutes, Chapter 111⅔, appears as Section 60 of the Illinois Public Utilities Act.]

Section 67. *Right to inspect books and property and to examine agents of public utilities.*

The Commission, each commissioner, assistant commissioner and each officer and employee of the Commission properly authorized thereby shall have the right, at any and all times to inspect the papers, books, accounts and documents, plant, equipment or other property of any public utility, and the Commission, each commissioner, assistant commissioner, and any officer of the Commission authorized to administer oaths shall have power to examine under oath any officer, agent or employee of such public utility in relation to any matter within the jurisdiction of the Commission. * * *

* * * *

[Section 67, 1961 Illinois Revised Statutes, Chapter 111⅔, appears as Section 63 of the Illinois Public Utilities Act.]

Section 72. *Action to set aside orders of commission—Jurisdiction.*

Within thirty days after the service of any order or decision of the Commission refusing an application for a rehearing of any rule, regulation, order or decision of the Commission, or within thirty days after the service of any final order or decision of the Commission upon and after a rehearing of any rule, regulation, order or decision of the Commission, any person or corporation affected by such rule, regulation, order or decision, may appeal to the

circuit or superior court of the county in which the subject-matter of the hearing is situated, or if the subject-matter of the hearing is situated in more than one county, then of any one of such counties, for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined. * * * *

* * * * * * *

[Section 72, 1961 Illinois Revised Statutes, Chapter 111⅔, appears as Section 68 of the Illinois Public Utilities Act.]

Section 76. *Reparation for overcharge—Investigation of claims against public utilities.*

When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

* * * * * * *

All complaints for the recovery of damages shall be filed with the Commission within one year from the time the produce, commodity or service as to which complaint is made was furnished or performed, and a petition for the enforcement of an order of the Commission for the payment of money shall be filed in the proper court within one year from the date of the order, except that if an appeal is taken from the order of the Commission, the time from the taking of the appeal until its final adjudication shall be excluded in computing the one year allowed for filing the petition to enforce such order.

The remedy provided in this section shall be cumulative, and in addition to any other remedy or remedies in this Act provided in case of failure of a public utility to obey a rule, regulation, order or decision of the Commission.

The Commission shall have power to receive complaints regarding loss or damage occasioned by a public utility, and to make inquiry as to the methods of adjusting such claims. All claims against any public utility for loss of, or damage to property, or for any other loss or damage, in connection with a public utility service, not covered by the preceding paragraphs of this section, if not acted upon within ninety days from the date of the filing of the claim with the public utility, may be investigated by the Commission, in its discretion, and the results of such investigation shall be embodied in a special report which shall be open to public inspection.

[Section 76, 1961 Illinois Revised Statutes, Chapter 111⅔, appears as Section 72 of the Illinois Public Utilities Act.]

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
RULE INVOLVED	2
STATEMENT	2
REASONS FOR DENYING THE WRIT	3
CONCLUSION	10

TABLE OF CITATIONS

CASES:

Archer v. *United States*, 268 F.2d 687 (10th Cir. 1959)	7
Babcock v. *Town of Erlanger*, 34 F. Supp. 293 (E.D. Ky. 1940)	5
Cameron v. *President and Fellows of Harvard College*, 157 F.2d 933 (1st Cir. 1946)	7
Formulabs, Inc. v. *Hartley Pen Co.*, 275 F.2d 52 (9th Cir.), *cert. den.* 363 U.S. 830 (1960)	7
Harrington Bros v. *City of New York*, 35 F.2d 1009 (S.D. N.Y. 1929)	5
Hunt Tool Co. v. *Moore, Inc.*, 212 F.2d 685 (5th Cir. 1954)	5
Hurd v. *Illinois Bell Telephone Co.*, 234 F.2d 942 (7th Cir.), *cert. den.* 352 U.S. 918 (1956)	7
Kansas v. *Colorado*, 185 U.S. 125, 142 (1902)	9
Land-O'Lakes Creameries v. *Louisiana State Bd. of Health*, 160 F. Supp. 387 (E.D. La. 1958)	9
Natural Gas Pipeline Co. v. *Federal Power Commission*, 141 F.2d 27 (7th Cir. 1944)	5
Oklahoma ex rel. Johnson v. *Cook*, 304 U.S. 387, 396 (1938)	9
People v. *Marquette Nat'l Fire Ins. Co.*, 351 Ill. 516, 524, 527, 184 N.E. 800, 803, 804 (1933)	9

PAGE

Sam Fox Publishing Co. v. *United States*, 366 U.S. 683 (1961) 6

Stadin v. *Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962) 7

Sutphen Estates, Inc. v. *United States*, 342 U.S. 19 (1951) 6

United States v. *Wilhelm Reich Foundation*, 17 F.R.D. 96 (D. Me. 1954), *aff'd mem. sub nom. Baker* v. *United States*, 221 F.2d 957 (1st Cir.) *cert. den.* 350 U.S. 842 (1955) 7

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 24(a) and (b) ..... *passim*

4 Moore's Federal Practice ¶¶ 24.03-24.05, 24.07, 24.08 (1962) 7, 8

Moore & Levi, *Federal Intervention: The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 591 (1936) 7

Note, 63 Yale L.J. 408, 412, 415 (1954) 7

Proceedings of the Institute on Federal Rules of Civil Procedure (Washington, D.C., October 1938) p. 57; (Cleveland, Ohio, July 1938) p. 265 7

NO. 237

IN THE

SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1963

STATE OF ILLINOIS,
Petitioner,

v.

COMMONWEALTH EDISON COMPANY, et al.,
Respondents-Plaintiffs

and

ALLIS-CHALMERS MANUFACTURING COMPANY, et al.,
Respondents-Defendants

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS-DEFENDANTS IN OPPOSITION

QUESTION PRESENTED

Whether the State of Illinois, claiming to represent certain Illinois consumers of electric power, may intervene *as of right* under Rule 24(a) of the Federal Rules of Civil Procedure in private antitrust actions brought by certain Illinois, Indiana and Iowa utilities against manufacturers of electrical equipment for damages allegedly resulting from fixed prices charged for such equipment.

RULE INVOLVED

Rule 24(a) of the Federal Rules of Civil Procedure is as follows:

> "(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

STATEMENT

In the District Court the Attorney General of Illinois sought to intervene in these actions in two distinct capacities under two different legal theories. First, as set forth in his brief to the Court of Appeals, "*permissively*, the Illinois Attorney General sought to intervene [under Rule 24(b)] on behalf of the state agencies and institutions who had made *purchases* of the involved electrical equipment. . . ." (Pet. C.A. Br. 3, emphasis added)[1]. In the proposed complaint attached to the motion to intervene the State alleged that as a purchaser it had been directly injured by alleged violations of the antitrust laws on the part of defendants and it sought damages directly from defendants. The District Court refused permission to intervene on this ground because such "suits will [in themselves] approach unmanageable proportions both in preparation and trial . . . and will unduly delay and prejudice the adjudication

1. Brief of Appellant, State of Illinois, Proposed Intervenor as Party Plaintiff, to Court of Appeals for the Seventh Circuit; hereinafter cited as "Pet. C.A. Br. ."

of the rights of the original parties." (Pet. 19.)[2] The Court of Appeals affirmed (Pet. 25), and the petition here does not seek further review of the lower courts' denial of permission for the State to intervene as a purchaser of electrical equipment.

Second, "*as of right*, the State of Illinois sought to appear [pursuant to Rule 24(a)] in order to represent and protect the interests of the '. . . *consumers*" of electrical energy which had been supplied by the four Illinois plaintiff utilities, in order to share in whatever "recoveries . . . may be realized [by the plaintiff utilities] in these proceedings . . . ." (Pet. C.A. Br. 2-3, emphasis added.) The District Court's denial of intervention as of right on behalf of consumers, as affirmed by the Court of Appeals, is the *sole issue* which the State now asks this Court to review.

REASONS FOR DENYING THE WRIT

The result reached by the District Court and affirmed by the Court of Appeals on the basis of exhaustive argument—that the State as representative of consumers has no right under Rule 24(a) to intervene in these actions—accords with settled constructions of Rule 24(a). The State has clearly failed to meet the explicit requirements imposed by the Rule and the decisions of this Court interpreting it. No new or even significant federal question is presented for review; intervention has consistently been denied in similar cases, and the State cites no authority to the contrary. The State's intervention would moreover unduly and unnecessarily confuse these already complex cases. Accordingly, its request has been uniformly opposed by plaintiffs and defendants alike. Under these circumstances, no con-

2. Petition for writ of Certiorari and accompanying Appendix; hereinafter cited as "Pet."

ceivable reason exists for this Court to grant the review which the petition requests.

1. While citing as error certain of the reasons advanced by the Court of Appeals for affirming the District Court's denial of intervention, the petition neglects to present an affirmative theory supporting the claimed *right* of consumers to intervene in these cases. The theory of the State's proposed complaint remains, therefore, the touchstone for consideration of the State's motion on its merits.

As ground for its motion to intervene under Rule 24(a)(3), the State asserted that "the recovery of . . . damages by these plaintiffs [the utilities] will create a fund for distribution . . . in which . . . consumers . . . have a direct interest" and that the Attorney General as representative of these consumers sought "to protect the public interest involved in the proper disposition of such a fund." (R. 18-19.)[3] In the portion of its proposed complaint dealing with its claim as a representative of consumers, the State did not assert any claim against defendants. It sought merely to have "any damages which shall be awarded herein to [the named Illinois utilities] . . . refunded on an equitable and proportionate basis to the consumer-customers of said [utilities] . . ." (R. 23), on the theory that electrical rates "were based upon and included the cost and expense of purchases of electrical equipment at fixed, excessive and non-competitive prices", and that consumers "accordingly were required to pay rates and charges for public utility services which were higher than would have been the case if the prices paid for the electrical equipment here involved had been purchased at prices resulting from the operation of free and open competition." (R. 22-23.) Because damages were thus "passed on" to consumers, petitioner

3. Record (Certified Copy of Printed Appendix For the use of the Court Below); hereinafter cited as "R."

argued, the consumers were therefore entitled to intervene in these cases under Rule 24(a)(3) in order to share in a "fund" consisting of whatever damages might possibly be awarded the plaintiff utilities.

The fallacy in the theory of petitioner's motion and complaint is that to the extent the higher prices allegedly paid for electrical equipment were "passed on" to the consumers through higher electrical rates, the plaintiff utilities were not damaged. Under petitioner's theory, it must follow that the damages, if any, which ultimately may be awarded plaintiffs in these actions will include only the damages actually borne by the plaintiff utilities and will not include amounts passed on to consumers. Therefore, petitioner has not even the color of a claim of right to intervene under Rule 24(a)(3) to share in any "fund" which might conceivably be created at some future date by an award of damages in these actions.

It is, however, unnecessary for the Court to determine whether consumers would in fact have such an interest because Rule 24(a)(3) is not satisfied by the mere contingency that a "fund" may come into existence at some future date. The courts have consistently recognized that the Rule expressly requires the existence of "*property* which *is*" in the court's custody. (Emphasis added.) See, *e.g.*, *Hunt Tool Co.* v. *Moore, Inc.*, 212 F.2d 685 (5th Cir. 1954); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 141 F.2d 27 (7th Cir. 1944); *Babcock* v. *Town of Erlanger*, 34 F. Supp. 293 (E.D. Ky. 1940); and *Harrington Bros.* v. *City of New York*, 35 F.2d 1009 (S.D. N.Y. 1929). The absence of such a presently existing "fund" is fatal to the State's intervention under subsection (3).

2. Apparently recognizing the fundamental fallacy in the theory of its complaint, petitioner now urges to this Court a nebulous remedy as against defendants which it

suggests somehow entitles consumers, whom it claims to represent, to intervene as a matter of right under Rule 24(a)(2). (Pet. 10.) But subsection (2) gives a right to intervene only "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action. . . ." By its own admission petitioner does not meet this test.

Petitioner conceded in the trial court that the "consumer-customers [whom it claims to represent] are not parties to this suit, and, therefore, under the principles of *res judicata* are not bound. . . ." (Pet. D.C. Memo. 19)[4], and petitioner does not contend before this Court that a judgment in the main action will be *res judicata* as to it or the consumers. (Pet. 10.) That Rule 24(a)(2) incorporates the doctrine of *res judicata* is conclusively established by the decisions of this Court in *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19 (1951) and *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961). In the *Sutphen* case—a government antitrust suit brought to divide Warner Brothers—this Court denied intervention to a lessor of theatre properties because "the decree in this case . . . is not *res judicata* of the rights sought to be protected through intervention." (342 U.S. at 21.) In the even more recent *Sam Fox Publishing* case, this Court, applying traditional standards of *res judicata*, refused intervention under Rule 24(a)(2) to an association of writers and publishers in a proceeding to modify an antitrust decree. Although recognizing that "the very existence of the outstanding decree would as a matter of comity either preclude further relief or operate to limit the relief some future equity court might decree", the

4. Memorandum of the State of Illinois In Support of Motion to Intervene as Party Plaintiff, to District Court for Northern District of Illinois (Eastern Division).

Court nevertheless ruled that such adverse effect (far more serious than is alleged by the petitioner here) "is not at all the equivalent of being *legally bound*, which is what must be made out before a party may intervene as of right" under Rule 24(a)(2). (366 U.S. at 694, emphasis added.)[5]

Furthermore, the history of Rule 24(a)(2) shows that it was not intended to expand the *right* to intervene as it existed at the time of the adoption of the Federal rules but merely to restate the established federal practice which allowed intervention as a matter of right only when the judgment in the main action would be *res judicata* as to the applicant.[6]

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5. The three cases cited to support petitioner's argument to the contrary (Pet. 10) have been superseded by the above-cited decision of this Court and subsequent holdings in the same circuits. See, *e.g.*, *Hurd* v. *Illinois Bell Telephone Co.*, 234 F.2d 942 (7th Cir.), *cert. den.* 352 U.S. 918 (1956); *Stadin* v. *Union Electric Co.*, 309 F.2d 912, 918 (8th Cir. 1962). See also *Cameron* v. *President and Fellows of Harvard College*, 157 F.2d 993 (1st Cir. 1946); *Formulabs, Inc.* v. *Hartley Pen Co.*, 275 F.2d 52 (9th Cir.), *cert. den.* 363 U.S. 830 (1960); *Archer* v. *United States*, 268 F.2d 687 (10th Cir. 1959); *United States* v. *Wilhelm Reich Foundation*, 17 F.R.D. 96 (D. Me. 1954), *aff'd mem. sub nom. Baker* v. *United States*, 221 F.2d 957 (1st Cir.), *cert. den.* 350 U.S. 842 (1955).

6. See *Proceedings of the Institute on the Federal Rules of Civil Procedure* (Washington, D.C., October, 1938), p. 57; *Id.* (Cleveland, Ohio, July, 1938), p. 265; 4 *Moore's Federal Practice*, ¶¶24.03-05, 24.08 (1962); Moore & Levi, *Federal Intervention: The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 591 (1936) (a study of federal practice relied upon by the draftsmen of the Federal Rules; see notes of the Advisory Committee following Rule 24).

In arguing for consideration of the collateral question of consumers' "interest" under the antitrust laws, the State misconceives the purpose of Rule 24(a), which is to make possible a determination of the right to intervention on the comparatively easily determinable basis of *res judicata*, rather than on the more hazy question of "interest". See *Moore's Federal Practice*, ¶24.08 (1962). See also Note, 63 Yale L.J. 408, 411, 415 (1954).

3. The discussion of the substantive rights of consumers, to which the petition is largely devoted, is not relevant to the issue raised by denial of the State's motion to intervene as of right on the consumers' behalf. The problem here is purely one of petitioner's rights under Rule 24(a), and petitioner has not shown such a right either here or in the courts below. It is manifestly unnecessary on such a motion for the Court to concern itself with the State's hypothetical discussion of whether consumers have a compensable interest under the antitrust laws or with its tenuous speculations concerning the ultimate disposition of damages, if any, which may conceivably be awarded. To do so would be to confuse the question of the "right to intervene" with that of the "rights of the intervenor", questions which, as Professor Moore has pointed out, should be kept distinct. See 4 *Moore's Federal Practice*, ¶24.07 (1962). The determination that consumers have no right to the *procedural* expedient of intervention in these proceedings is not a determination that they have no *substantive* rights, as against either defendants or the plaintiff utilities, nor does it foreclose their independent pursuit of such rights. Indeed, although the State now contends that intervention affords the "sole avenue for protection of" consumers (Pet. 8), its brief below to the Court of Appeals explicitly asserted that alternative remedies exist apart from intervention. (Pet. C.A. Br. 17, n. 3.) Clearly, questions concerning the existence or delineation of their substantive rights are simply not presented on a motion under Rule 24(a).

4. Finally, the result below must be approved for the cumulative reason that the Attorney General has no legal authority to represent the private rights of consumers of electricity. Under Illinois law, the Attorney General is authorized to participate only in matters where the "State is "directly interested" and "may not appear [in cases]

where but a part of the public are interested." *People* v. *Marquette Nat'l Fire Ins. Co.*, 351 Ill. 516, 524, 527, 184 N.E. 800, 803, 804 (1933). Here, only a portion of the public (the customers of certain of the plaintiffs) are even claimed to have the interest which the Attorney General seeks to protect.[7] Furthermore, their "interest", asserted as stemming from a private right to share in such damages as may be collected by the plaintiff utilities from the defendants, is obviously private. It does not, therefore, involve the protection of the general welfare of all citizens which is essential to support Illinois' claimed right to represent consumers here. *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 396 (1938); *Kansas* v. *Colorado*, 185 U.S. 125, 142 (1902); *Land O'Lakes Creameries* v. *Louisiana State Bd. of Health*, 160 F. Supp. 387 (E.D. La. 1958).

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7. It should also be noted that although the plaintiff utilities involved in these actions sell to consumers in Illinois, Indiana and Iowa, neither the Attorneys General nor any other representatives of electrical consumers in Indiana or Iowa have sought to intervene here.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

Dated: July 25, 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 237

STATE OF ILLINOIS,

Petitioner,

VS.

COMMONWEALTH EDISON COMPANY, ET AL.,

Respondents-Plaintiffs,

AND

ALLIS-CHALMERS MANUFACTURING COMPANY, ET AL.,

Respondents-Defendants.

REPLY BRIEF.

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August 9, 1963.

Printed by Authority of the State of Illinois

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963.

No. 237

STATE OF ILLINOIS,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY, ET AL.,

Respondents-Plaintiffs,

AND

ALLIS-CHALMERS MANUFACTURING COMPANY, ET AL.,

Respondents-Defendants.

REPLY BRIEF.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

It is respectfully submitted that the briefs of the respondents in opposition to the petition for certiorari, far from suggesting that certiorari should be denied, make it clear that certiorari should be granted for the reasons set out in the petition.

First. The respondents-plaintiffs assert that petitioner's "argument that the court of appeals has misconstrued the

so-called '*res judicata*' requirement of Rule 24(a)(2) is a patent effort to conjure up reasons for review by this Court." (Plaintiffs' brief in opposition page 8.) This serious charge of imposing on this Court is specifically refuted by defendants-respondents, for whom it is quite clear that petitioners' case for intervention failed exactly because "Rule 24(a)(2) incorporates the doctrine of *res judicata*." (Defendants' brief in opposition page 6.)

Second. Respondents-defendants assert that the petitioner's substantive rights, resulting from the increased costs to consumers because defendants' imposition on the public utilities in violation of the anti-trust laws, is irrelevant to the petitioner's right of intervention. (Defendants' brief in opposition, page 8.) On the other hand, respondents-plaintiffs, with adequate quotation from the opinion of the Court of Appeals, point out that that court, purporting to rely on the *Keogh* decision, rejected petitioner's intervention on the ground that consumers can have no interest created by federal law in recuperating losses resulting from the depredations of the manufacturers on the utilities. (Plaintiffs' brief in opposition, page 7.)

Third. With reference to the validity of the pass-on defense, we find the respondents again in conflict. The respondents-defendants assert that petitioner cannot intervene because, to the extent that the utilities passed on the additional costs to the consumers, the utilities will not be able to recover from the defendants and, therefore, the intervenor would have no interest in any recovery by the plaintiff. (Defendants' brief in opposition, page 5.) The respondents-plaintiffs make it clear, on the other hand, that their position is that the fact that "respondents-plaintiffs will benefit from any recovery to the exclusion of the consumers who have allegedly borne the loss is irrelevant." (Plaintiffs' brief in opposition, page 7.) In short,

that there will be a fund recovered for losses passed on to consumers but consumers should not be permitted to share in the recovery.

The necessity for this Court to rule on the questions of the construction of the *Keogh* case, of the requirement of *res judicata* in Rule 24, and of the validity of the "pass-on" defense, it is submitted, have been made abundantly clear by the two briefs in opposition when they are read in conjunction. Equally clear is the fact that the consumers interest will receive no protection from either of the parties, or from anybody else, unless the State is permitted to intervene.

The petition for certiorari should be granted.

Respectfully submitted,

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